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IN THE UTAH SUPREME COURT

* * * * *

JOHN WAGNER ASSOCIATES, d/b/a
GRABBER UTAH,

Plaintiff-Respondent,

VS.

HERCULES, INC.,

Defendant-Petitioner.

**BRIEF OF PETITIONER
HERCULES, INC.**

Case No. 890017-CA

Petition for a Writ of Certiorari
from the Court of Appeals, State of Utah

Judges Bench, Davidson and Orme, Utah Court of Appeals

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FILED

DEC 26 1990

Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

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| JOHN WAGNER ASSOCIATES, d/b/a |) | BRIEF OF PETITIONER |
| GRABBER UTAH, |) | HERCULES, INC. |
| |) | |
| Plaintiff-Respondent, |) | |
| |) | |
| vs. |) | Case No. 890017-CA |
| |) | |
| HERCULES, INC., |) | |
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PARTIES TO THE PROCEEDING

The initial parties to this action included plaintiff John Wagner Associates, dba Grabber Utah, and defendants Hercules, Inc. and Modulaire Industries, Inc. Prior to trial, defendant Modulaire Industries Inc. and plaintiff John Wagner Associates, dba Grabber Utah settled their disputes. Defendant Modulaire Industries Inc. is therefore not a party to this appeal.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in deciding that the mobile office units which Hercules leased from Modulaire should be regarded as realty as a matter of law, and that the leasing of the units is therefore within the scope of the Utah Contractors' Bond statute, Utah Code Ann. § 14-2-1 et seq. (1986).

2. Whether the Court of Appeals erred in deciding that Hercules' use of the Navy's land and its lease of the mobile office units, when combined, constitute a real property interest which is sufficient to be attached under the Utah Mechanics' Lien statute, Utah Code Ann. § 38-1-1 et seq. (1974 and Supp. 1986).

OPINION OF THE COURT OF APPEALS

The Opinion of the Utah Court of Appeals is published at 797 P.2d 1123 (Utah App. 1990). A copy of the Opinion, as filed, is attached as Addendum A. References in this Petition are to the attached Opinion.

JURISDICTION

This Court has appellate jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(a) (1990). This appeal is from a decision by the Court of Appeals, dated August 31, 1990, with an order respecting a Petition for Rehearing entered November 26, 1990. The Court of Appeals originally awarded attorneys' fees to Wagner. However, in an unpublished Order on Rehearing, dated November 26, 1990, the Court amended its Opinion to delete the

attorneys' fees award. A copy of the Order is attached as Addendum B.

DETERMINATIVE STATUTORY PROVISIONS

The two determinative statutory provisions are set forth in Addendum C. They are Utah's Mechanics' Lien statute, Utah Code Ann. § 38-1-1 et seq. (1986) and Utah's Contractors' Bond statute, Utah Code Ann. § 14-2-1 et seq. (1974 and Supp. 1986).

STATEMENT OF THE CASE

Defendant-Petitioner Hercules, Inc. (hereinafter "Hercules") has an award/contract to produce missiles for the United States Navy at a plant located on land owned by the federal government and controlled by the Navy. (R. 234, Exhibit 2; R. 248-249; R. 640, p. 104). On June 7, 1985, Hercules gave a purchase order to Modulaire Industries Inc. (hereinafter "Modulaire") under which Modulaire agreed to lease mobile office units for Hercules' use for a period of 24 months. (R. 640, p. 53 Exhibit 64). Modulaire transported thirty modular units measuring 14 feet by 60 feet to the plant site and assembled the units together to form the shells of the two office units. (R. 640, p. 69-70, Exhibit 71).

Because the interiors of the mobile office units were unfinished, Modulaire contracted with Space Building Systems (hereinafter "SBS") to perform the interior finishing of the units using demountable partitioning. (R. 640, p. 75-76; R. 170, Exhibit 4). SBS subcontracted with plaintiff-respondent John

Wagner Associates, dba Grabber Utah (hereinafter "Wagner") for materials used in completing the interiors of the units. (R. 443). Hercules never contracted with SBS or with Wagner to perform any work on the units. (R. 640 p. 105-106).

Modulaire paid SBS in full all sums due and owing for the work performed on the interiors of the trailers, but SBS filed for relief under Chapter 11 of the United States Bankruptcy Code before paying Wagner under the subcontract. (R. 171; R. 640 p. 12; R. 443). Wagner made demand for payment from Modulaire and Hercules, and upon their refusal to make payment for the materials, filed a notice of lien against an alleged interest of Hercules in the Navy's property with the Salt Lake County Recorder, pursuant to Utah Code Ann. § 38-1-1 et seq. (hereinafter the "Mechanics' Lien statute"), and subsequently filed this action to foreclose on the lien. (R. 443). A cause of action was also asserted against Hercules for failure to obtain a payment bond pursuant to Utah Code Ann. § 14-2-1 et seq. (1986) (hereinafter the "Payment Bond statute"). (R. 640, p.9).

The parties submitted various motions for summary judgment and memoranda in support thereof. On March 22, 1988, Judge Noel of the Third Judicial District Court of Salt Lake County, State of Utah, granted Hercules' Renewed Motion for Summary Judgment with respect to Wagner's First Claim for Relief for mechanic's lien foreclosure, finding that Hercules' interest in the Navy's property was not alienable and that Hercules had no interest in the Navy's property sufficient to allow attachment under the Utah Mechanics' Lien statute, Utah Code Ann. § 38-1-1 et seq.

(R. 509-512). In the same order Judge Noel denied Hercules' Motion for Summary Judgment and Hercules' Renewed Motion for Summary Judgment concerning the Second Claim for Relief for failure to obtain a payment bond. (R. 509-512).

Prior to trial, Wagner and Modulaire entered into a Stipulation of Dismissal and an Order of Dismissal, settling all causes of action between them. (R. 619-621).

Trial took place on July 12, 1988. The only cause of action remaining at trial was against Hercules for failure to obtain a payment bond pursuant to Utah Code Ann. § 14-2-1 et seq. (R. 640, p. 9). At the conclusion of the trial, the trial court found that Wagner had no cause of action against Hercules under Utah Code Ann. § 14-2-1 (1986). (R. 630-631). The trial court determined that the placing of these mobile office units leased from Modulaire on the Navy's land by Hercules did not constitute the construction, addition to, alteration or repair of a building, structure or improvement upon land as required by Payment Bond statute. (R. 628).

The trial court also determined that Hercules, by virtue of its placing these leased mobile office units on the Navy's land, was not subject to the provisions of § 14-2-1 (1986) and that Hercules therefore had no obligation to obtain a bond for the benefit of Wagner. (R. 628). Findings of Fact and Conclusions of Law were entered by the trial court on August 24, 1988. (R. 623-629).

The Court of Appeals held that, as a matter of law, the mobile office units constitute realty for purposes of the Payment

Bond statute and that the leasing of the units is within the scope of the statute. The Court reversed and remanded the District Court's Judgment with instructions to find for Wagner on that issue. Opinion at p. 18. The Court of Appeals also concluded that the alienability of an owner's property interest is not a precondition to the attachment of a mechanic's lien and it reversed the District Court's Order granting summary judgment to Hercules on this issue. Wagner's foreclosure action was thus reinstated and remanded. Opinion at p. 18.

ARGUMENT

A Writ of Certiorari is appropriate when the Court of Appeals has decided a question of state law in a way that is in conflict with a decision of the Supreme Court. Utah Rules of Appellate Procedure, R. 46(b). The decision of the Court of Appeals in this case conflicts with this Court's decision in Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279 (Utah 1982). A Writ of Certiorari is also appropriate when the Court of Appeals has decided an important question of state law which has not been, but should be, settled by the Supreme Court. Id., R. 46(d). This case presents a question as to whether a contract for the construction of missiles which is not alienable can be construed as a property interest which could be subject to attachment of a mechanic's lien. The Opinion of the Court of Appeals misapprehends the Payment Bond statute, the Mechanic's Lien statute, and the cases cited interpreting these statutes. This Court, therefore, should grant a Writ of Certiorari

reversing the decision of the Court of Appeals and reinstating the District Court's Order and its Judgment.

I. THE COURT OF APPEALS' DECISION THAT THE LEASED MOBILE OFFICE UNITS CONSTITUTE REAL RATHER THAN PERSONAL PROPERTY CONFLICTS WITH A DECISION OF THE SUPREME COURT.

The Court of Appeals correctly acknowledges "the general principle that the modular buildings must be regarded as realty before the Payment Bond Statute will apply." Opinion at p. 8 (emphasis added). This Court has articulated a test for the express purpose of determining whether property is real or personal. See Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279 (Utah 1982). Nevertheless, in the present case, the Court of Appeals refused to apply the test set forth in Mueller, disregarded the factual findings of the trial court, and concluded on its own that the mobile office units constitute realty for purposes of both the Payment Bond and Mechanics' Lien statutes.

Utah's Mechanics' Lien and Payment Bond statutes are similar in nature, similar in language and identical in purpose. The Mechanics' Lien statute provides that persons furnishing materials used in the construction or improvement of any building, structure, or improvement to any premises shall have a lien on the property for which they furnish materials. A lien granted under this statute can only attach to such interest as the owner may have in the property. Utah Code Ann. § 38-1-3 et seq. (1974 and Supp. 1986). Similarly, the Payment Bond statute provides that the owner of any interest in land entering into a contract

for the construction or improvement of any building, structure or improvement upon land shall obtain from the contractor a bond conditioned for the faithful performance of the contract and prompt payment for materials furnished and labor performed under the contract. Utah Code Ann. § 14-2-1 et seq. (1986).

The statutes are read in pari materia and are applied equally and consistently to the same fact situation. The similarity between the Mechanics' Lien statute and the Payment Bond statute was noted long ago by the Utah Supreme Court in Rio Grande Lumber Co. v. Darke, 50 Utah 114, 167 P.241 (1917), in which the court upheld the constitutionality of Utah's Bond statute. Id. at 128, 167 P. at 246. Both of these statutes apply to (1) owners of an interest in land (2) for construction, additions, alterations, or repairs to any building, structure, or improvement on the land. In Rio Grande Lumber Co., the Supreme Court noted that the Utah Bond statute "is auxiliary to our mechanic's lien law, and just as much in aid of it as if it had been made a part of it and incorporated in the same chapter." Id. at 124, 167 P. at 245.

Materials become an integrated part of real property only when annexed to the land or made a part of some permanent structure on the land. Mueller, 657 P.2d at 1283; Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 190, 341 P.2d 207, 211 (1959); Eccles Lumber Co. v. Martin, 31 Utah 241, 87 p.713 (1906). In Mueller, supra, this Court established a tripartite test to be used in distinguishing between real and personal property for the purpose of establishing whether a conversion from

personal to real property has occurred. The three factors articulated by the Court are: (1) The manner in which the item is annexed to realty; (2) Whether the item is adaptable to the particular use of the realty; and (3) The intention of the annexor to make an item a permanent part of the realty. It is apparent that the Mueller test is fact specific.

The Mueller Court determined that an item is "adaptable" to the particular use of the realty when it is integrated into real property to further a specific purpose for which the real property has been devoted. 657 P.2d at 1283-84. The court stated, however, that personal property located on real property that is adaptable to multiple uses does not become "adapted" simply because the presence of the personal property determines the use of the real property at a particular time. 657 P.2d at 1284. In the instant case, the property was vacant and highly adaptable to multiple uses. (R. 640, p.120-121). Placing these trailers on the property did nothing to further any specific purpose for which the property could be devoted. The trailers are used as temporary offices and do not have any special integration with the real property. (R. 640, p.54, 106-107). The adaptation prong of the Mueller test has therefore not been met.

Another important prong of the Mueller test is whether the parties intended the property to be personal property or real property. 657 P.2d at 1284. In this case, the "intention" of the parties to retain the personal property characteristics of the units is strongly supported by the transaction documents. The written quote from Modulaire to Hercules was for mobile

office units, specifying both setup and dismantling charges. (R. 218, R 640, p.53). In addition, each trailer is required to have a Manufacturer's Statement of Origin and to have a Motor Vehicle License under Utah law. (R. 640, p.82-87, Exhibits 118-122, 127-128). Since each trailer is classified as a motor vehicle by the Department of Motor Vehicles, each unit is issued a license plate and a certificate of title, and is thereafter taxed as personal property. Id.¹

Therefore, the annexation, the adaptation and the intention prongs of the Mueller test have not been met and the property must be regarded as personalty rather than realty.

Contrary to the conclusion of the Court of Appeals, the Utah Supreme Court did not limit the applicability of the Mueller test to the issue of whether equipment had become an improvement upon the land. Opinion at p. 8. The Court of Appeals attempts

¹ Valuable insight also is obtained from the tax provisions of Utah law. Utah Code Ann. § 59-2-601(1) (Supp. 1987), defines the trailers as mobile homes, since they are inter alia transportable in one or more sections with the plumbing, heating, and electrical systems contained within the structure and used for commercial purposes when erected on-site on a foundation. The tax provisions further provide that a mobile home is permanently affixed when anchored to, and supported by, a permanent foundation. Utah Code Ann. § 59-2-601(2) (Supp. 1987). Mobile homes are taxed as real property if (1) the mobile home is permanently affixed; (2) the owner of the mobile home and the real property to which the mobile home is affixed files an affidavit of affixture; and (3) the certificate of title or manufacturer's certificate of origin of the mobile home is surrendered. Utah Code Ann. §§ 59-2-602(1) - (3) and 59-2-603 (Supp. 1987). Liens against a mobile home that has been converted to real property must then be perfected in the manner provided for liens on real property. Utah Code Ann. § 59-2-602(5) (Supp. 1987). The trailers in the instant case, however, are still vehicles or mobile homes. They were not converted to real property by the process set forth by statute.

to distinguish Mueller from the present case on the grounds that the subject property in Mueller is dairy equipment, whereas the subject property in this case is a "building," which, by fiat of the Court of Appeals, is realty. Such a distinction begs the question. Moreover, it ignores the test designed to make the determination of whether property is real or personal. The Mueller test applies where, as here, the issue is whether the subject property is personal or real. The Court of Appeals erred in side stepping the Mueller test, in not applying it to the facts of this case, and in legislating that mobile trailers are per se realty.

Furthermore, the Court of Appeals cites Waldorf v. Elliot, 214 Or. 437, 330 P.2d 355 (1958), in support of its argument that the units in question were "buildings" and therefore realty. Opinion, at p. 9. However, the Waldorf court actually used the same tripartite test set forth in Mueller to determine whether the property in question was realty or personalty.² In

² The Waldorf decision indicates that the most important element in the tripartite test was the intent of the parties. It stated: "The tendency found in modern decisions is to stress the third test -- that of intention -- making it controlling where there is doubt as to the effect of the two others [annexation and adaptation]." 330 P.2d at 357. As the trial court found, the intention of Hercules and Modulaire was clearly to have these mobile office units remain personalty because they anticipated that Modulaire would someday remove them from the property, as it had done with other trailers leased to Hercules. Some of these trailers previously removed from Hercules ended up at Word Perfect's property in Provo. (R. 640, p. 115). Hercules cannot understand why the Court of Appeals believes it should have to satisfy a Bond claim where the benefit of the work may be enjoyed by future lessees of the trailers.

The intention that the trailers remain personalty is also evidenced by the fact that Modulaire's written quote to Hercules

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Waldorf, the issue was whether certain grain tanks located on property being sold to Mr. and Mrs. Waldorf were personal property and not part of the sale, or whether the grain tanks were real property and included in the sale. Even though the court considered the tanks to be "buildings," that determination did not conclusively indicate the buildings were realty. The court said that determination simply shifted the burden of proof to the party claiming the property was personalty to show that it retained that character. 330 P.2d at 357. Hercules has met that burden of proof; the evidence adduced at trial established clearly that the mobile office units are personalty.

As both Mueller and Waldorf show, whether property is real or personal is a fact specific issue. The trial court denied Hercules' Motion for Summary Judgment and Renewed Motion for Summary Judgment concerning Wagner's Claim for Relief under the Payment Bond Statute precisely because it found the existence of factual issues relating to the trailers and whether they could truly be considered improvements to the Navy's land. See Order of the District Court, point 3, attached as Addendum D. In so ruling, the trial court correctly apprehended that whether the mobile office units constitute realty or personalty is a threshold issue of fact which must be determined before the court can decide whether the Payment Bond statute applies. On this

Footnote continued from previous page.

for the mobile office unit complex included both setup and dismantling charges. (R. 218). Based upon this intention, the mobile office units remained personalty and therefore were outside the scope of the Payment Bond and Mechanics' Lien statutes.

important fact question, the trial judge listened to the testimony, viewed the evidence, and reached his decision. The Court of Appeals, downplaying and ignoring the work of trial court, ruled that the issue was one of law, not fact. Opinion at p. 6. In so deciding, however, the Court of Appeals erred because it ignored the rule of law this court established in Mueller.

The error the Court of Appeals made regarding the deference owed to the trial court lead directly to the erroneous conclusion that the leasing arrangement between Hercules and Modulaire was a contract within the scope of the Payment Bond Statute. Opinion at p. 6-7 n. 4. This conclusion is erroneous and overreaching. SBS, not Hercules, contracted for the construction of the mobile office units. Hercules was not a party to that contract nor did it negotiate that contract with Wagner. Wagner was a subcontractor of SBS, SBS was a subcontractor of Modulaire, and Modulaire was the lessor of the units. The contract between SBS and Wagner involved Hercules only to the extent that Hercules would someday lease the mobile office units for which Wagner was providing materials. Hercules, therefore, did not contract with Wagner for the construction of the units, as required by the Payment Bond statute.³

³ The use the Court of Appeals makes of the stipulation at trial as to the contractual chain as a basis for its conclusions of law is somewhat incredible in light of the fact that parties frequently stipulate at trial as to contractual chain to eliminate the need for extensive evidence. The mere fact that Hercules stipulated that it was in a contractual chain certainly was not meant to demonstrate that it was part of a construction project. Hercules has always maintained that it is nothing more than a lessee of mobile trailers.

The trial court's finding that the mobile office units were never made part of the Navy's land is not clearly erroneous. The standard for review of the trial court's Findings of Fact is set forth in Utah Rule of Civil Procedure 52(a). It provides, in pertinent part:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility the witnesses. . . .

This Court has recently upheld this standard in Butler v. Lee, 108 Utah Adv. Rep. 49, 50 (Utah Ct. App. 1989). See also State v. Walker, 743 P.2d 191, 192-193 (Utah 1987). In Walker, the Utah Supreme Court quoted Wright & Miller in defining that standard:

The appellate court. . . does not consider and weigh the evidence de novo. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law.

Id. at 193 (citing Wright & Miller, Federal Practice & Procedure, § 2585 (1971)). Thus, under the "clearly erroneous" standard of Rule 52(a), this Court will uphold the Findings of Fact entered by the trial court unless this Court determines that the findings are against the clear weight of the evidence, or unless this Court otherwise reaches a definite and firm conviction that a mistake has been made. Walker, 743 P.2d at 193.

In its effort to reach the conclusion that the mobile office units are realty, the Court of Appeals not only abandons

the guidance provided by this Court, but leaves logic and common sense behind as well. The Court states:

Although the modular buildings may constitute personal property as between Hercules and the Navy because they have not been permanently anchored to the land, and although the lease agreement may have caused the buildings to retain their personal property status as between Hercules and Modulaire, as between Hercules and its materialman, Wagner, we regard the buildings to be real property.

Opinion at p. 13 (emphasis added). Petitioner is aware of no authority or rational basis for the proposition that property may be considered both real and personal simultaneously. In so deciding, the Court of Appeals has simply pronounced its desired outcome without supporting it with sound legal analysis.

II. HERCULES IS NOT SUBJECT TO UTAH'S MECHANICS' LIEN STATUTE BECAUSE IT HAS NO ALIENABLE INTEREST IN REAL PROPERTY ON WHICH THE COURT COULD FORECLOSE TO SATISFY WAGNER'S LIEN.⁴

The purpose of Utah's Mechanics' Lien statute is to prevent the owners of land from having their lands improved

⁴ Because the materials supplied by Wagner were never converted to realty under the Mueller test, the Mechanics' Lien statute does not apply. As discussed above, the trial court found, as a matter of fact, that the mobile office units were not realty for purposes of the Payment Bond statute. However, the Mueller test applies directly to the issue of whether property is realty or personalty for purposes of the Mechanics' Lien statute. Mueller, 657 P.2d at 1283. Therefore, reinstating the trial court's judgment and giving deference to its findings of fact, as this Court should, necessarily removes this case from the scope of the Mechanics' Lien statute as well. It is true that such a result leaves this plaintiff without a remedy, but fashioning such a remedy is the province of the state legislature, not of the courts.

without having to pay the reasonable value for the materials and labor provided. Crane Co. v. Utah Motor Park, Inc., 8 Utah 2d 413, 416, 335 P.2d 837, 839 (1959); Rio Grande Lumber Co., 50 Utah at 127, 167 P. at 246. A mechanic's lien is a judicial mechanism to obtain for suppliers of goods or services payment for their labors and wares. When a lien is claimed on property, Utah Code Ann. § 38-1-15 provides that "[t]he court shall cause the property to be sold in satisfaction of the liens and costs as in the case of foreclosure of mortgages. . . ." The issue, therefore, is whether the Mechanics' Lien statute applies when the party defendant owns no alienable interest in the property in dispute.

The land on which the mobile office units are located is owned by the United States Government and is under the jurisdiction of the Navy. (R. 234, Exhibit 2; R. 248-249; R. 640, p. 104). However, the United States Navy did not contract for the lease, placement, or finishing of the units. The government is not a party to the contract involved in this action, and Hercules is not acting on behalf of the United States. Furthermore, the mobile office units for which Wagner supplied materials are neither public buildings nor public works within the scope of the Miller Act and therefore the Navy's land cannot be the subject of a lien and a subsequent sheriff's sale, or judicial sale.⁵

⁵ In a related case, United States For The Use Of Idaho Western, Inc. v. Modulaire Manufacturing and Hercules, Inc., filed in the United States District Court for the District of Utah, Central Division, the plaintiff was a party in the same position as Wagner, having contracted with SBS to supply materials for the

Footnote continued on next page.

Hercules uses the land without any lease, but pursuant to an award/contract. (R. 639, p. 31). Hercules is allowed to use the land only for so long as it uses the land for work on government contracts. Id. Hercules is not the owner of the land and it has no interest to which a mechanic's lien could attach. Nor does it have an interest which could possibly be sold at a sheriff's sale or other judicial sale.

It is clear from Utah law that Hercules' interest can in no way be considered a lease. Four factors must exist for a valid lease: (1) A binding contract in compliance with the statute of fraud; (2) Possession by the tenant; (3) Legal title in the landlord; and (4) A leasehold that is capable of being granted. Summary of Utah Real Property Law, Vol. II at 565-66 (1978). Here, the second factor, possession by the tenant, has not been satisfied. Hercules is using the Navy's land pursuant to its award/contract, and has the right to use the land only so long as it uses it to work on government contracts. Hercules does not have legal possession of the land, which is necessary for a valid lease to exist. "The concept of where legal title remains is important in distinguishing a lease from other legal relationships. Likewise it is important in determining who has possession rights. For example, the landlord/tenant relationship

Footnote continued from previous page.

same mobile office units, and having not been paid. In that case, Judge Bruce S. Jenkins dismissed the action with prejudice pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, since the plaintiff's claim was barred by the Miller Act, 40 U.S.C. § 270(a) et seq.

is distinguished from the licensor-licensee relationship in that the licensee never gains exclusive possession of the land; he receives only permission to use it." Id. at 565, note 2. Hercules' Use Agreement is just that, a use agreement, and Hercules clearly does not have "exclusive possession of the land."

The district court correctly found that Hercules' interest in the land is not alienable and that it is not sufficient to be attached under the Utah Mechanics' Lien statutes, Utah Code Ann. § 38-1-1, et seq.

The Court of Appeals argues that the District Court's ruling would contravene the purpose of the Mechanics' Lien and Payment Bond statutes and would encourage owners of property to structure their dealings in such a way as to avoid the applicability of the statutes. Opinion at p. 15. However, the possibility of any such conduct occurring in the business world is remote at best. First, making missiles for the United States government is an infrequent, even rare, business enterprise. Second, few of the companies making missiles for the United States government likely operate on government land. Third, of those missile-making companies operating on United States government land, very few likely operate in mobile office units. Finally, even fewer of those companies are likely to have situations involving subcontractors who do not get paid for their work by a bankrupt contractor and thus attempt to assert a mechanic's lien on the property. The argument is without merit.

The Court of Appeals' solution to the fact that Hercules owns no alienable interest in real property benefited by Wagner is unworkable and illogical. The Court states:

Hercules has two separate and distinct property interests: (1) an equitable interest in the Navy's land pursuant to the award/contract; and (2) an equitable interest in the buildings pursuant to a leasing arrangement with Modulaire. When combined, these two component interests constitute the property that was benefited by Wagner's materials. Wagner's lien attached to this cumulative property interest. We believe that in order to give full effect to the Mechanic's Lien Statute, Wagner may pursue the sale of the component property interests separately.

Opinion at p. 16-17 (emphasis added). However, the Court of Appeals fails to reveal the alchemy by which a court may combine two unrelated property interests, neither of which is individually capable of supporting a lien, creating therefrom a cumulative property interest which is capable of having a lien attached to it, and then selling off the component interests separately.

The Court of Appeals' solution is without any theoretical or practical value. First, as discussed above, Hercules has no interest in the Navy's land which could possibly be sold at a sheriff's sale or other judicial sale. Second, as determined by the trial court, the mobile office units leased from Modulaire were not annexed to the land, and thus the requirement that the units be real property is not met. Therefore, the notion that these interests, when combined, constitute an interest that can support a lien is nonsense. The doctrine espoused by the Court of Appeals would allow courts to create something out of nothing. Such a doctrine ignores a basic tenant of our system that we live

and conduct our business by rule of law promulgated by a legislature, not by rule of a few persons to whom the legislative power was not entrusted.

Furthermore, the solution of the Court of Appeals' is unworkable as a practical matter. There is no satisfactory way to structure such a sale. Since the award/contract with the Navy entitles Hercules to use the Navy's land only for so long as Hercules is manufacturing missiles for the Navy, a foreclosure sale would terminate Hercules' right immediately and the purchaser would acquire nothing. In sum, the Court of Appeals' solution is an illogical theory with no application in the real world.⁶

CONCLUSION

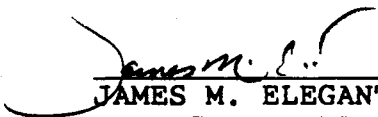
The Modulaire trailers leased to Hercules were personal property and did not become part of the Navy's land by virtue of the fact that Hercules leased them from Modulaire. Therefore, this Court should affirm the trial court's conclusion that the placing of these leased mobile office units on the Navy's land by Hercules pursuant to its lease with Modulaire did not constitute the construction, addition to, alteration or repair of a

⁶ In light of the practical impossibility of implementing the Opinion of the Court of Appeals, it is ironic that the court quotes the Utah Supreme Court in Stanton Trans. Co. v. Davis, "When uncertainty exists as to the interpretation and application of a statute, it is appropriate to look to its purpose in light of its background and history, and also to the effect it will have in practical application." 9 Utah 2d 184, 187, 341 P.2d 207, 209 (1959), quoted in Opinion at p. 5 (emphasis added). The opinion of the Court of Appeals provides no solution which is workable or enforceable.

building, structure, or improvement upon land as required by Utah's Contractors' Bond statute, Section 14-2-1, Utah Code Ann. (1986), and that it did not place Hercules within the class of persons subject to the provisions of Section 14-2-1. And this Court should affirm the trial court's Judgment dismissing with prejudice Wagner's Complaint.

Hercules has no interest in the land to which a mechanic's lien would attach. Consequently, there is in this case no remedy under the Mechanics' Lien statute because there is no interest in the land which could possibly be sold at a sheriff's sale or other judicial sale. This Court should therefore affirm the District Court's finding that Hercules' interest in the land is not alienable and that it is not sufficient to be attached under Utah's Mechanics' Lien statute, Utah Code Ann. § 38-1-1, et seq., and this Court should affirm the District Court's Order dismissing with prejudice Wagner's First Claim for Relief in its Complaint.

DATED this 26th day of December, 1990.



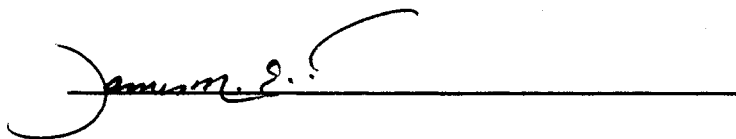
JAMES M. ELEGANTE
MARK S. WEBBER
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Respondent
Hercules, Inc.

MAILING CERTIFICATE

On this 26th day of December, 1990, I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the PETITION FOR WRIT OF CERTIORARI to the following:

Darrel J. Bostwick
Walstad & Babcock, P.C.
254 West 400 South, #200
Salt Lake City, UT 84101

and further certify that this Petition is presented in good faith and not for delay.



336:121390B

Tab A

ADDENDUM A

FILED

IN THE UTAH COURT OF APPEALS

AUG 31 1990

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John Wagner Associates, d/b/a)
Grabber Utah,)

Plaintiff and Appellant,)

v.)

Hercules, Inc., Modulaire)
Industries, Inc., and John Does)
I-X,)

Defendants and Appellee.)

OPINION
(For Publication)

Case No. 890017-CA

Third District, Salt Lake County
The Honorable Frank G. Noel

Attorneys: Darrel J. Bostwick and Robert F. Babcock, Salt Lake
City, for Appellant
James M. Elegante and Mark S. Webber, Salt Lake
City, for Appellee

Before Judges Bench, Davidson, and Orme.

BENCH, Judge:

Plaintiff, John Wagner Associates, d/b/a Grabber Utah (Wagner), appeals the dismissal of its complaint against defendant Hercules, Inc. (Hercules). Wagner sought to recover compensation for construction materials supplied by Wagner for two modular buildings constructed on behalf of Hercules. We reverse and remand.

Hercules has an award/contract to build missiles for the United States Navy at its Bacchus Works plant. The plant is located on land owned by the federal government and controlled by the Navy. In order to obtain additional office facilities at the site, Hercules leased two modular office complexes from Modulaire Industries, Inc. (Modulaire). The lease, which was entered into in June 1985 for a term of two years, included an option to renew and an option to buy. Modulaire transported thirty modular units measuring fourteen feet by sixty feet to

the plant site and assembled the units together to form the shells of two sizable buildings.

Modulaire subcontracted with Space Building Systems (SBS) to provide labor and materials to finish the 25,000 square feet of office space inside the buildings. Wagner supplied drywall and other construction materials to SBS for the interior finishing. After the interior work was completed, SBS owed Wagner a balance of \$14,300.03 for supplies and materials. Before Wagner was able to collect the outstanding balance, however, SBS filed for bankruptcy. Demand by Wagner for payment from Modulaire and Hercules was unsuccessful.

Wagner filed a notice of mechanic's lien against the property with the Salt Lake County Recorder, pursuant to the provisions of Utah Code Ann. §§ 38-1-1 et. seq. (1988) (hereafter, the Mechanic's Lien Statute), and subsequently filed this action to foreclose on the lien. A cause of action was also asserted against Hercules for failure to obtain a payment bond as required by Utah Code Ann. §§ 14-2-1 et. seq. (1986) (hereafter, the Payment Bond Statute).¹

The trial court dismissed Wagner's foreclosure action on summary judgment, ruling that no mechanic's lien was available because Hercules's interest in the land was inalienable. The payment bond cause of action went to trial. Following a bench trial on the payment bond claim, the trial court found in favor of Hercules on the ground that Hercules's leasing of the office units did not "constitute the construction, addition to, alteration or repair of a building, structure, or improvement upon the land."

Wagner appeals, seeking reversal of the summary judgment and reinstatement of its foreclosure action. Wagner also seeks reversal of the final judgment on its payment bond cause of action and remand to the trial court for determination of damages under the Payment Bond Statute.

We are asked to interpret two similar statutes: (1) the Payment Bond Statute which requires an owner to obtain from the contractor a payment bond prior to the construction of a

1. A third cause of action was asserted against Modulaire for breach of an agreement to issue joint checks payable to both SBS and Wagner. Wagner and Modulaire, however, settled prior to trial and Modulaire is not a party to this appeal.

building in order to guarantee that materialmen and laborers will be paid;² and (2) the Mechanic's Lien Statute which

2. The Payment Bond Statute provides in relevant part:

14-2-1 Bond to protect mechanics and materialmen.

The owner of any interest in land entering into a contract, involving \$2,000 or more, for the construction, addition to, alteration, or repair of any building, structure, or improvement upon land shall, before any such work is commenced, obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, conditioned for the faithful performance of the contract and prompt payment for material furnished, equipment and materials rented, and labor performed under the contract. This bond runs to the owner and to all other persons as their interest may appear. Any person who has furnished or rented any equipment or materials, or performed labor for or upon any such building, structure, or improvement, for which payment has not been made, has a direct right of action against the sureties upon such bond for the reasonable value of the rented materials or equipment furnished, for the reasonable value of the materials furnished, or for labor performed, not exceeding the prices agreed upon. This right of action accrues 40 days after the completion, abandonment, or default in the performance of the work provided for in the contract.

This bond shall be exhibited to any person interested, upon request.

14-2-2 Failure to require Bond - Direct liability - Limitations of actions.

Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as herein required, shall be

creates a lien against the improved property in favor of the contractors, subcontractors, and materialmen.³

(Footnote 2 continued)

personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon. Actions to recover on such liability shall be commenced within one year from the last date the last materials were furnished or the labor performed.

Section 14-2-1 was amended in 1987 and in 1989. 1987 Utah Laws 218; 1989 Utah Laws 271; see also Utah Code Ann. § 14-2-1 (Supp. 1990).

3. The Mechanic's Lien Statute provides in relevant part:

38-1-3 Those entitled to lien - What may be attached.

Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise. This lien shall attach only to such interest as the owner may have in the property.

"When uncertainty exists as to the interpretation and application of a statute, it is appropriate to look to its purpose in the light of its background and history, and also to the effect it will have in practical application." Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 187, 341 P.2d 207, 209 (1959). "[T]hese statutes should be interpreted and applied in such a manner as to carry out the purpose for which they were created: to protect those who supply labor and materials." King Bros., Inc. v. Utah Dry Kiln Company, 21 Utah 2d 43, 45, 440 P.2d 17, 18 (1968) (referring to Payment Bond Statute). See also Interiors Contracting, Inc. v. Navalco, 648 P.2d 1382, 1386 (Utah 1982) (Mechanic's Lien Statute to be construed broadly to protect materialmen and laborers).

The aim and purpose of our mechanic's lien law manifestly has been to protect, at all hazards, those who perform the labor and furnish the materials which enter into the construction of a building or other improvement. The result has been that the owner of the premises, at whose instance and for whose benefit the improvement is made, has been the one most likely to suffer loss. He pays at his peril the original contractor, who generally needs it and demands it as the work progresses.

If he does not reserve enough of the fund in his own hands to pay for the labor of subcontractors and employees, and the price of materials, he incurs the risk of having to pay over again for at least a part of these items.

.
. . . The bond, as in this case[,] is conditioned for the faithful performance of the contract and securing the payment of the laborers and materialmen. If the owner requires the contractor to procure the statutory bond, he is protected against loss. If he does not, he becomes liable to laborers and materialmen if the contractor fails to pay them, even though he may have paid the contractor in full. He has his remedy in his own hands.

Rio Grande Lumber Co. v. Darke, 50 Utah 114, 122, 127, 167 P. 241, 244, 246 (1917) (emphasis added).

Even though the two statutes have similar language and similar purposes and have often been treated without differentiation, we will address the statutes separately in the interest of clarity.

Inasmuch as the issues before us are limited to questions of law, namely, questions of statutory interpretation, no deference need be given the trial court's conclusions. Forbes v. St. Mark's Hospital, 754 P.2d 933, 934 (Utah 1988). We therefore review the trial court's statutory interpretations for correctness. Copper State Thrift and Loan v. Bruno, 735 P.2d 387, 389 (Utah Ct. App. 1987).

PAYMENT BOND STATUTE

Wagner claims it was error for the trial court to conclude as a matter of law that the interior work done after assembly of the modular units did not constitute the "construction, addition to, alteration, or repair of any building, structure, or improvement upon land."

The legal issue before us is whether the leasing of the modular buildings was outside the scope of the Payment Bond Statute because the buildings might be considered personalty rather than realty. We hold that, for purposes of the Payment Bond Statute, the modular buildings are to be regarded as realty as a matter of law, and that the leasing of modular buildings is therefore within the scope of the Payment Bond Statute.

When stripped of its extraneous provisions, the plain language of section 14-2-1 of the Payment Bond Statute requires that "[t]he owner of any interest in land entering into a contract, involving \$2,000 or more, for the construction . . . of any building . . . obtain from the contractor a bond" Application of this plain language to the uncontroverted facts of the present case provides a ready result.

Hercules entered into a contract with Modulaire to lease two modular office buildings. The lease agreement with Modulaire constituted a contract for the construction of a building involving \$2,000 or more.⁴ Wagner provided

4. The lease arrangement entered into between Hercules and Modulaire constituted "a contract" for the construction of a

materials for the buildings which were built under Hercules's lease agreement with Modulaire. Wagner did not receive payment from SBS for the materials. Hercules did not obtain a payment bond whereby Wagner could receive payment for the materials following SBS's failure to pay Wagner. Hercules is therefore personally liable to Wagner under section 14-2-2. See King

(Footnote 4 continued)

building. The parties stipulated at trial to the following contractual chain; "Hercules being at the top of a contract train, Modulaire being the second, Space Building Systems being third. . . . And then Grabber Utah, Plaintiff here involved in the chain." Hercules stipulation that it was in the contract chain for the construction of the complexes necessarily implies that its lease arrangement with Modulaire constituted a contract for the construction of a building.

Even absent the parties' stipulation, the leasing arrangement constitutes a contract for the construction of a building on its own merits. The purchase order by which Hercules leased the complexes from Modulaire states: "These complexes will be built to Hercules specification no. 9106." (emphasis added). The purchase order also states "Installation to be complete as soon as possible. Hercules will be responsible for site preparation, sewer, water and electrical service hookups." The purchase order also provided for one time charges for "delivery, set-up and skirting" of the complexes which were to be billed separately from the monthly lease payments. The construction contract between Modulaire and SBS similarly refers to Hercules as the "Owner" and Modulaire as the "Contractor."

In any event and in view of the foregoing indicators that the lease was viewed by the parties as a contract for the construction of a building, we conclude as a matter of law that the leasing arrangement was such a contract. If a lessee enters into an agreement to lease a building which is not currently on its land but will be constructed by the lessor, the lessee is necessarily entering into a contract to construct the building upon its land or the land in which it has an interest. The construction of the building is necessary before the lease may become effective. By entering into the lease the lessor incurs an obvious contractual obligation to build the building. Inherent in such a lease is a contract for the construction of the building itself or else the lease agreement would be void and of no effect.

Bros., Inc., 440 P.2d at 19 (shipment of materials to the job site and their consumption in the construction of a building was "a sufficient basis upon which to predicate liability for defendant's failure to obtain the bond.").

Despite the apparently clear applicability of the Payment Bond Statute, Hercules contends that the modular buildings did not become part of the realty as is required before the Payment Bond Statute may be applied. We recognize the general principle that the modular buildings must be regarded as realty before the Payment Bond Statute will apply. The issue therefore becomes whether these modular buildings are to be regarded as realty for purposes of the Payment Bond Statute.

Physical Nature of The Modular Buildings

Hercules seeks to avoid liability through application of the personal property "integration" test found in Paul Mueller Co. v. Cache Valley Dairy Association, 657 P.2d 1279 (Utah 1982).⁵ The trial court applied the Mueller test to determine whether the modular buildings had become integrated into the land and found that they had not. The trial court therefore concluded that the leasing of the modular office complexes did not constitute the construction of buildings. In effect, the trial court concluded that in order for a building to be a "building" under the Payment Bond Statute, it must be permanently anchored to the soil. There is, however, no such requirement.

The test established in Mueller does not apply to the present case because the issue addressed in Mueller is not the issue before us. The Payment Bond Statute applies when work is done on, or materials are provided for, (1) any building, (2) any structure, or (3) any improvement upon land. Section 14-2-1. Mueller dealt solely with the issue of whether whey drying equipment was an "improvement upon the land." The

5. At issue in Mueller was whether whey drying equipment became part of the realty. The Utah Supreme Court considered the following three factors to determine whether the equipment had been sufficiently integrated into the realty so as to create a mechanic's lien: (1) the manner in which the equipment was attached or annexed to the realty; (2) whether the equipment was adaptable to the particular use of the realty; and (3) the intention of the annexor to make the equipment a permanent part of the realty. Mueller, 657 P.2d at 1282.

present case, on the other hand, involves the construction of "buildings" which is a separate and distinct category. In other words, the Mueller test for determining whether personal property had become an improvement upon land does not resolve the present issue of what constitutes a building.

If we were to adopt the Mueller test for what constitutes an improvement upon land as the test for what constitutes a building, we would effectively destroy the statutory "building" category. This we may not do because it would alter the materialman's burden of proof. "[T]he fact that the properties in question were buildings is of itself sufficient evidence that they were affixed to and became part of the realty. . . ." Waldorf v. Elliott, 214 Or. 437, 330 P.2d 355, 357 (1958). If a materialman can prove that its materials were consumed in a building, that is all the statute requires. We refuse to impose the additional requirement that a materialman go further and also prove that the building is an improvement upon the land.

Hercules fails to provide a single payment bond case requiring that a modular building be permanently anchored to the land. Hercules instead invokes the principle of in pari materia and relies upon mechanic's lien cases to establish a requirement that buildings be permanently anchored to the land before the Payment Bond Statute will apply. We are not persuaded. Our mechanic's lien cases, in fact, are either silent or support the opposite conclusion.

The first mechanic's lien case cited by Hercules is Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 341 P.2d 207 (1959). In Stanton, subcontractors sought to foreclose mechanic's liens for the costs of transporting a drilling rig to the defendant's property and for tools used in the project. The Stanton court did not discuss whether a building must be permanently anchored to the land in order for a mechanic's lien to attach. In fact, the circumstances of the case support the opposite conclusion since a mechanic's lien was granted by the trial court for the labor expended in erecting the drilling rig, a temporary structure.

The second mechanic's lien case offered by Hercules is Eccles Lumber Co. v. Martin, 31 Utah 241, 87 P. 713 (1906). At issue in Eccles was whether the plaintiff had properly complied with the recording requirements of the lien statute. Again, whether a building must be permanently anchored to the soil was not discussed by the court.

A third mechanic's lien case that was not cited by Hercules, but that we find particularly persuasive on this issue is Sanford v. Kunkel, 30 Utah 379, 85 P. 363, modified in part, 85 P. 1012 (1906). In Sanford, a mechanic's lien was granted for labor and material against a house that had been removed from the property upon which it was constructed and placed on another lot. The Utah Supreme Court held that the removal of the house did not destroy the lien on the land or on the house. We believe that if the actual removal of a building from the land will not defeat the attachment of a mechanic's lien to the building, then the mere intent to remove a building, as evidenced by the temporary manner in which the building is attached to the land, should not be permitted to defeat a lien, or, in this case, the Payment Bond Statute.

"It is settled . . . that a building need not be physically anchored to the land to be considered realty. It may be found to be a fixture though it is secured to the realty by force of gravity alone." Rinaldi v. Goller, 48 Cal. 2d 276, 309 P.2d 451, 453 (1957).

There is no reason why one object should not be deemed a fixture merely because it is heavy and requires no attachment when a lighter object can be said to have passed the test of annexation because its lightness requires some sort of device to attach it to the realty. The method of attachment does, of course, in some cases conclusively establish the article as part of the realty. The method of attachment, however, does not ever conclusively establish that certain articles are not a part of the realty"

Waldorf v. Elliott, 330 P.2d at 357 (prefabricated grain tanks of imposing size and weight that appeared to be permanent constituted buildings even though they were attached to land by gravity alone).

The issue then becomes simply whether or not the modular office complexes are buildings. "What is a building must always be a question of degree; but ordinarily the word refers to a structure enclosing a space within walls and roof." 12 C.J.S. Building (1980) (footnotes omitted).

Hercules describes the office complexes as temporary trailers. This characterization is inaccurate. Hercules did not simply lease a few trailers to be used as portable offices;

it leased two "complexes" from Modulaire. Modulaire delivered thirty modular units measuring fourteen feet by sixty feet that were assembled together in a stationary fashion to create two buildings that together contained over 25,000 square feet of office space, complete with electricity, plumbing, climate control systems, sidewalks and parking lots.

The so-called "trailers" were nothing more than sections of a building that were transported to the building site upon their own wheels rather than upon a truck bed, a fact which is not controlling. See generally Thorp Finance Corp. v. Wright, 16 Utah 2d 267, 399 P.2d 206 (1965). Nor is it controlling that the units are taxed as self-contained mobile homes. Id. 399 P.2d at 208. It should also be noted that, according to the evidence submitted to the trial court, these units did not necessarily have four walls but were in fact designed to open into the neighboring units once assembled. We therefore conclude that these modular units could not be considered individual self-contained trailers.

Hercules argues that since the buildings were modular and could be disassembled and removed from the site, they were not permanent. We consider the buildings sufficiently permanent because they were assembled in a stationary manner and because Hercules could, if it so desired, retain the buildings on the Navy's land indefinitely by exercising its option to extend the lease or its option to purchase the buildings. Hercules has, in fact, extended the lease several times and has indicated its intention to purchase the buildings. Hercules has built parking lots and sidewalks around these buildings, as if they were to remain permanently. We also note the considerable expense incurred by Hercules in locating these modular buildings on the site and the significant expense that Hercules would incur in removing the buildings.

The fact that a stationary modular building is deliberately designed, assembled and installed in order to be disassembled and removed at some later date with relative ease does not prevent it from being a building. "Modern Authority . . . has minimized the importance of the method by which the article is attached or annexed to the realty." Waldorf v. Elliott, 330 P.2d at 357. We "must acknowledge that prebuilt [buildings], mobile or otherwise, . . . are a part of our changing society, and give recognition to the fact that the law must be

responsive to the best interests of those whom it is designed to serve." Heath v. Parker, 93 N.M. 680, 681-82, 604 P.2d 818, 819-20 (1980).

Legal Nature of the Modular Buildings

Hercules also argues that the lease agreement with Modulaire prevented the buildings from becoming realty. The Utah Supreme Court has already addressed this argument in a similar fact situation and rejected it. Metals Manufacturing Co. v. Bank of Commerce, 16 Utah 2d 74, 395 P.2d 914 (1964).

In Metals Manufacturing, the Bank of Commerce was the lessee of a building under a ten-year lease. A provision of the lease granted to the Bank the right to "make alterations, attach fixtures and erect additions, structures or signs" which were to remain the personal property of the Bank and which could be removed from the building by the Bank. The Bank, without obtaining a payment bond, contracted to have aluminum gates and railings installed, and paid the contractor for their installation. The contractor, however, did not pay the plaintiff who had supplied the gates and railings and the plaintiff sued for damages under the Payment Bond Statute.

The Bank argued that the intention of the Lessor and Lessee that the fixtures remain personal property, as evidenced by the lease, prevented the installation of the railings from being "an addition, alteration or repair of any building, structure or improvement on land" because the owner of the building and land would not receive any permanent benefit from the modifications.

The bank leans heavily on the principle that whether facilities such as these are part of the realty depends on the intentions of the parties. Generally this is true and binds the parties to the lease. However, it would seem to be unrealistic and unreasonable to conclude that such parties by agreement among themselves, could bind third party suppliers of materials to the terms of an agreement to which such suppliers were not privies and the terms of which they do not know. Such conclusion could result in easy circumvention of the statute whose purpose clearly is to protect suppliers, if what they supply falls within the clear import of the statute.

Id., 395 P.2d at 915. See also King Bros., Inc., 440 P.2d at 19 (materialmen have "no practical way" of knowing details of arrangements between an owner of a building and others who have actual title to the ground).

Hercules's assertion that a private agreement may prevent improvements from becoming realty for purposes of the Payment Bond Statute would effectively exclude from the scope of the statute all construction of, or improvements to, leased modular buildings. Under Hercules's approach, unsuspecting materialmen would be left unprotected for materials provided for leased modular buildings. The lessee of the modular building, however, would receive the direct benefit of such modifications without incurring any responsibility for payment. This result would be directly contrary to the purpose of the Payment Bond Statute.

The purpose of the mechanics' and materialmen's lien statutes and likewise the [Payment Bond Statute] is to prevent the owners of land from having their lands improved with the materials and labor furnished and performed by third persons, and thus to enhance the value of such lands, without becoming personally responsible for the reasonable value of the materials and labor which enhance the value of those lands.

Crane Co. v. Utah Motor Park, Inc., 8 Utah 2d 413, 416, 335 P.2d 837, 839 (1959).

The fact that a lease was used as the contract whereby the buildings were constructed is of no consequence when it was Hercules who caused the buildings to be built, thereby causing the consumption of Wagner's materials, and it was Hercules's leasehold interests that were directly benefited by the materials.

Summary as to Nature of The Buildings

Although the modular buildings may constitute personal property as between Hercules and the Navy because they have not been permanently anchored to the land, and although the lease agreement may have caused the buildings to retain their personal property status as between Hercules and Modulaire, as between Hercules and its materialman, Wagner, we regard the buildings to be real property.

Our holding gives full effect to the purpose of the Payment Bond Statute which is that the risk of loss be borne by "the owner of the premises, at whose instance and for whose benefit the improvement [was] made." Rio Grande, 167 P. at 244. By failing to obtain a payment bond, Hercules ignored its statutory duty to insure Wagner's payment and is therefore personally liable to Wagner.

MECHANIC'S LIEN STATUTE

Wagner also argues that it was error for the trial court to dismiss its mechanic's lien foreclosure action due to its conclusion of law that Hercules's interest in the real property was inalienable and therefore insufficient to be attached under the Mechanic's Lien Statute. The issue before us then is whether alienability is a precondition to the attachment of a mechanic's lien. We hold that there is no such precondition.

The Mechanic's Lien Statute does not require that an owner's interest in real property be alienable before a mechanic's lien may attach. The only applicable precondition to the attachment of Wagner's mechanic's lien is that Wagner furnish "any materials . . . used in the construction . . . of any building." Section 38-1-3.

An alienability test, as adopted by the trial court, would be impossible to administer because of the unique nature of each real estate transaction. There is a multitude of "interests" an "owner" may have in property that may be liened,⁶ each with its own unique degree of alienability. For example, a donated parcel of property may have a reversionary interest in the event the property is no longer used for the purpose for which it was donated. Similarly, a lease may be unassignable, or may require written landlord approval prior to assignment. The possible degrees of alienability are limited only by the ingenuity of the parties

6. It is well established that the holder of an interest in realty which is less than fee title in the soil may be considered an owner for purposes of the Mechanic's Lien Statute. King Bros., Inc., 440 P.2d at 19. A mechanic's lien may attach to a leasehold estate, e.g. Interiors Contracting, Inc., 648 P.2d at 1386, or an equitable interest pursuant to a real estate contract, e.g. Roberts v. Hansen, 25 Utah 2d 190, 479 P.2d 345 (1971), or a building which has been removed from the land upon which it was constructed, Sanford 85 P. at 366.

involved. There is no clear line indicating that one degree of alienability would be sufficient and another would be insufficient. The unavoidable result would be confusion and arbitrariness in our mechanic's lien law.

We believe that the question of alienability is adequately provided for in the language of the Mechanic's Lien Statute. Alienability is but one of the rights contained in the bundle of property rights which an owner may possess. A mechanic's lien attaches "to such interest as the owner may have in the property." Section 38-1-3. We interpret this phrase to allow attachment of a mechanic's lien to the entire bundle of property rights belonging to the owner, whatever it may contain, without any requirement that any particular right, such as unrestrained alienability, be present.

If we were to exceed the plain language of the Mechanic's Lien Statute and impose the additional requirement that the property interest of an owner be sufficiently alienable before a mechanic's lien could attach, we would create great uncertainty which would, in effect, shift the risk of loss to materialmen and laborers. Materialmen and laborers, who have "no practical way" of knowing the legal status of the property they improve, King Bros., Inc., 440 P.2d at 19, would not know in advance whether the property they are improving is tainted by a restraint on alienability. In such cases materialmen and laborers would bear the risk of loss, rather than the owner who has received the benefit. This is contrary to the clear goal of the Mechanic's Lien Statute which is that the property owner bear the risk of loss. See Rio Grande Lumber Co., 167 P. at 244.

Ultimately, recognizing alienability as a precondition to the attachment of a mechanic's lien would destroy the Mechanic's Lien Statute. Owners could easily circumvent the Mechanic's Lien Statute by simply creating an inalienable interest in the land or in the building. We will not adopt a rule permitting such ready circumvention of the Mechanic's Lien Statute. Metals Manufacturing Co., 395 P.2d at 915.

We also conclude that our reasoning above, that a building need not be permanently anchored to the soil before the Payment Bond Statute will apply, is equally applicable to the Mechanic's Lien Statute. The Mechanic's Lien Statute provides in relevant part that "all persons . . . furnishing . . . any materials . . . used in the construction, alteration or improvement of any building, . . . shall have a lien upon the property upon . . . which they have . . . furnished . . . materials" Section 38-1-3.

Again, the Mueller test does not apply because the statute expressly refers to three types of modification to real property each carrying different tests. A mechanic's lien is expressly created for the value of materials supplied for the construction of a building. A materialman therefore only needs to prove that its materials were consumed in the construction of a building. The issue again becomes whether the modular office complexes constitute buildings for purposes of the Mechanic's Lien Statute. We conclude, for the same reasons stated above, that these sizable stationary modular complexes, complete with electricity, plumbing, climate control systems, sidewalks and parking lots, constitute buildings for purposes of the Mechanic's Lien Statute. The buildings are sufficiently permanent in that they may remain on the site indefinitely at Hercules's discretion.

Wagner provided drywall materials that were consumed in finishing the interiors of the modular buildings. Wagner therefore has a lien against the improved property. The issue then becomes, to what property does the lien attach? Hercules claims that a mechanic's lien cannot attach because its interest in the land cannot be "sold judicially." To focus solely on Hercules's interest in the land, however, ignores other property interests belonging to Hercules to which a mechanic's lien might properly attach.

In order to effectuate the purposes of the Mechanic's Lien Statute, the words "property," "realty," and "land" are to be broadly construed to include all property interests affected.

The word "land" as used in the law, has since time immemorial been regarded as a generic term. It ". . . includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage and water, or by the hand of man, as buildings, fixtures and fences." This is particularly true with respect to these lien statutes which should be liberally construed to effectuate their purpose.

King Bros., Inc., 440 P.2d at 19 (quoting 42 Am. Jur. Property, p. 196, and adding emphasis) (footnote omitted).

Hercules has two separate and distinct property interests: (1) an equitable interest in the Navy's land pursuant to the award/contract; and (2) an equitable interest in the buildings pursuant to a leasing arrangement with

Modulaire. When combined, these two component interests constitute the property that was benefited by Wagner's materials. Wagner's lien attached to this cumulative property interest. We believe that in order to give full effect to the Mechanic's Lien Statute, Wagner may pursue the sale of the component property interests separately.

[I]t has become quite generally recognized that at least in certain circumstances a mechanic's lien may attach to and be enforced against buildings or improvements alone. Thus a mechanic's lien upon improvements separately [sic] from the real estate has been upheld where the improvements and the land are not owned by the same party . . . or where the building constitutes a trade fixture and is thus not a part of the realty and is removable by the tenant or a licensee.

53 Am. Jur. 2d Mechanics' Liens § 257 (1970) (footnotes omitted).

In the present case, the buildings are owned by Modulaire and the land is owned by the Navy.⁷ Hercules brought these two separate ownerships together by virtue of its contract with the Navy and its lease with Modulaire. Where, as Hercules has argued, these buildings may easily be removed from the land without causing great injury to the land or the buildings, and where Hercules has shown that it has the right to remove the buildings, Hercules's component property interests may be sold separately at judicial sale. See Sanford, 85 P. at 367 (the

7. Hercules argued on appeal that the Miller Act, 40 U.S.C.A. §§ 270(a) et seq. (West 1986), which requires the procurement of performance and payment bonds on any public building or public work of the United States, applies to prevent a mechanic's lien from attaching to the Navy's land. This issue was raised for the first time on appeal and we need not address it. Heiner v. S.J. Groves & Sons Co., 790 P.2d 107, 115 (Utah Ct. App. 1990). However, in order to clarify the property interest being attached, we will point out that Wagner's lien attaches only to Hercules's interest in the land, whatever that might be, unless the improvements were made at "the instance of" the Navy. Interiors Contracting, Inc., 648 P.2d at 1386. The Miller Act therefore does not prevent the attachment of the lien to Hercules's interest and may only apply if Wagner were to try to attach the Navy's interest in the land. Inasmuch as that issue is not before us, we do not speculate on how the Miller Act may apply in that circumstance.

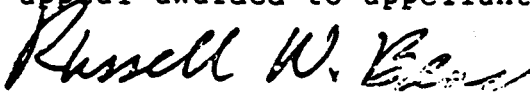
supreme court directed the trial court to order the sale of the original lot first; if the proceeds were insufficient to satisfy the liens, the house was to be sold) modified in part, 30 Utah 379, 85 P. 1012, 1013 (1906) (clarifying that the purchaser of the house at judicial sale would have the right to remove the house from its new location).

CONCLUSION

We find that the modular buildings, as a matter of law, constitute realty for purposes of the Payment Bond Statute. The trial court's determination that Hercules's leasing of the modular buildings did not constitute the construction of "any building" was therefore an erroneous conclusion of law. Based on the uncontested facts, we remand and instruct the trial court to find for Wagner and to determine the reasonable value of the materials furnished in accordance with section 14-2-2, Wagner's reasonable attorneys fees pursuant to section 14-2-3, and any other remedy to which Wagner may be entitled under the Payment Bond Statute.

We also conclude that alienability of an owner's property interest is not a precondition to the attachment of a mechanic's lien. The trial court's dismissal of Wagner's foreclosure action based on the purported inalienability of Hercules's property interest in the land was therefore based on an erroneous conclusion of law. We find that the modular buildings, as a matter of law, constitute realty for purposes of the Mechanic's Lien Statute. The foreclosure action is therefore reinstated.

Reversed and remanded for further proceedings consistent with this opinion. Costs and reasonable attorneys fees on appeal awarded to appellant Wagner pursuant to section 14-2-3.


Russell W. Bench, Judge

WE CONCUR:


Richard C. Davidson, Judge


Gregory K. Orme, Judge

COVER SHEET

CASE TITLE:

John Wagner Associates, dba
Grabber Utah,
Plaintiff and Appellant,

v.

Case No. 890017-CA

Hercules, Inc., Modulaire
Industries, Inc., and John Does I-X,
Defendants and Appellee.

PARTIES:

Darrel J. Bostwick
Walstad & Babcock, P.C.
Attorneys at Law for Appellant
254 West 400 South, #200
Salt Lake City, UT 84101

James M. Elegante
Mark S. Webber
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185 South State, Suite 700
P. O. Box 11898
Salt Lake City, UT 84147-0898

TRIAL JUDGE:

Honorable Frank G. Noel

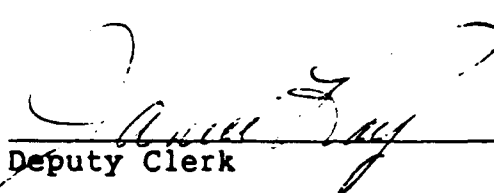
August 31, 1990. OPINION (For Publication)

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, reversed and remanded for further proceedings in accordance with the views expressed in the opinion filed herein. Costs and reasonable attorneys fees on appeal awarded to appellant.

Opinion of the Court by RUSSELL W. BENCH, Judge; RICHARD C. DAVIDSON, and GREGORY K. ORME, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 31st day of August, 1990, a true and correct copy of the foregoing OPINION was deposited in the United States mail or personally delivered to each of the above parties.


Deputy Clerk

TRIAL COURT:

Third District Court, Salt Lake County, #C86-404

Tab B

ADDENDUM B

FILED

OV. 26 1990

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

John Wagner Associates, d/b/a)
Grabber Utah,)

Plaintiff and Appellant,)

v.)

Hercules, Inc., Modulaire)
Industries, Inc., and John Does)
I-X,)

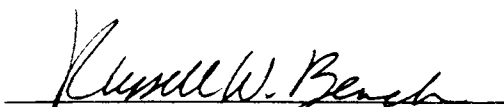
Defendants and Appellee.)

ORDER ON REHEARING
(Not for Publication)

Case No. 890017-CA

On rehearing, the Court hereby amends our previous opinion to delete the award of attorney fees under the payment bond statute.

FOR THE COURT:


Russell W. Bench, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 26th day of November, 1990, a true and correct copy of the foregoing ORDER ON REHEARING was hand-delivered or deposited in the United States mail.

Darrel J. Bostwick
Walstad & Babcock, P.C.
Attorneys at Law for Appellant
254 West 400 South, #200
Salt Lake City, UT 84101

James M. Elegante
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Parsons, Behle & Latimer
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P. O. Box 11898
Salt Lake City, UT 84147-0898

DATED this 26th day of November, 1990.

By

Deputy Clerk
Deputy Clerk

Tab C

ADDENDUM C

Utah Code Annotated § 14-2-1 et seq. (1986)

14-2-1. Bond to protect mechanics and materialmen.

The owner of any interest in land entering into a contract, involving \$2,000 or more, for the construction, addition to, alteration or repair of any building, structure, or improvement upon land shall, before any such work is commenced, obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, conditioned for the faithful performance of the contract and prompt payment for material furnished, equipment and materials rented, and labor performed under the contract. This bond runs to the owner and to all other persons as their interest may appear. Any person who has furnished or rented any equipment or materials, or performed labor for or upon any such building, structure, or improvement, for which payment has not been made, has a direct right of action against the sureties upon such bond for the reasonable value of the rented materials or equipment furnished, for the reasonable value of the materials furnished, or for labor performed, not exceeding the prices agreed upon. This right of action accrues 40 days after the completion, abandonment, or default in the performance of the work provided for in the contract.

This bond shall be exhibited to any person interested, upon request.

14-2-2. Failure to require bond - Direct liability - Limitation of actions.

Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as herein required, shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon. Actions to recover on such liability shall be commenced within one year from the last date the last materials were furnished or the labor performed.

14-2-3. Action on bond to protect mechanics and materialmen - Attorney's fee.

In any action brought upon the bond provided for under this chapter the successful party shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action.

14-2-4. Exceptions - Mortgagees, beneficiaries, trustees.

Nothing in this chapter requires a mortgagee under a mortgage or a beneficiary or trustee under a deed of trust to obtain the bond described in § 14-2-1 or imposes any liability

upon a mortgagee, beneficiary, or trustee who has not obtained such a bond.

Utah Code Annotated § 38-1-3 (1974 and Supp. 1986)

38-1-3. Those entitled to lien - What may be attached - Lien on ores mined.

Contractors, subcontractors and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner; all persons who shall do work or furnish materials for the prospecting, development, preservation or working of any mining claim, mine, quarry, oil or gas well, or deposit; and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished or rented materials or equipment for the value of the service rendered, labor performed or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as an agent, contractor or otherwise. Such liens shall attach only to such interest as the owner may have in the property, but the interest of a lessee of a mining claim, mine or deposit, whether working under bond or otherwise, shall for the purposes of this chapter include products mined and excavated while the same remain upon the premises included within the lease.

336/122190B

Tab D

ADDENDUM D

Filed at Third District Court

Date 3/18/89

2:15

PT

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 JAMES M. ELEGANTE (A0968)
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

| | | |
|---------------------------|---|---------------------|
| JOHN WAGNER ASSOCIATES, |) | |
| d/b/a GRABBER UTAH, |) | |
| |) | ORDER |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| HERCULES, INC., MODULAIRE |) | Civil No. C86-404 |
| INDUSTRIES, INC. and JOHN |) | |
| DOES I-X, |) | Judge Frank G. Noel |
| |) | |
| Defendant. |) | |

* * * * *

Defendant Modulaire Industries', Inc. ("Modulaire") Motion for Summary Judgment, in which defendant Hercules, Inc. ("Hercules") joined, came on regularly for hearing before the Honorable Judge Frank G. Noel on Friday, August 14, 1987 at 10:00 a.m. Plaintiff John Wagner Associates ("Wagner") was represented by Robert F. Babcock and Kurt Faux; Hercules was represented by James M. Elegante, and Modulaire was represented by Steven T. Waterman and Marco B. Kunz.

Hercules' Renewed Motion for Summary Judgment came on regularly for hearing before the Honorable Judge Frank G. Noel on Friday, February 26, 1988 at 10:00 a.m. Wagner was represented by Darrell J. Bostwick and Hercules was represented by James M. Elegante. Modulaire did not appear nor was it represented.

The Court having considered the pleadings and other papers on file herein, having heard the arguments of counsel and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. This Order supercedes and replaces the Order signed by the Court on September 16, 1987 and entered that same day and supercedes and replaces the Order signed by the Court on September 24, 1987 and entered that same day.

2. The Court finds that the interest of Hercules in the subject property is not alienable. Since the Court finds that the interest of Hercules is not alienable, the Court holds that said interest is not sufficient to be attached under the Utah mechanic's lien statutes, Utah Code Ann. § 38-1-1, et seq. Therefore, Wagner's First Claim for Relief as set forth in Wagner's Complaint, mechanic's lien foreclosure, is dismissed with prejudice.

3. The Court finds that Hercules may be defined as an "Owner" under Utah Code Ann. § 14-2-1(1)(b). However, the Court finds that there exist genuine issues of material fact which bear on the question of whether the improvements upon the

property are of the kind and nature which are covered by the Utah private construction bonding statutes, Utah Code Ann. § 14-2-1 et seq. Therefore, Hercules' Motion for Summary Judgment and Hercules' Renewed Motion for Summary Judgment concerning the Second Claim for Relief as set forth in Wagner's Complaint, failure to obtain a bond, is denied and the factual issues relating to the kind and nature of the improvements are reserved for trial.

4. The Court finds that there exist genuine issues of material fact which bear on Wagner's Third Claim for Relief, joint check agreement, as set forth in Wagner's Complaint. Therefore, Hercules' Motion for Summary Judgment concerning Wagner's Third Claim for Relief is denied and the factual issues relating to the alleged joint check agreement are reserved for trial.

ENTERED this 22nd day of March, 1988.

BY THE COURT:

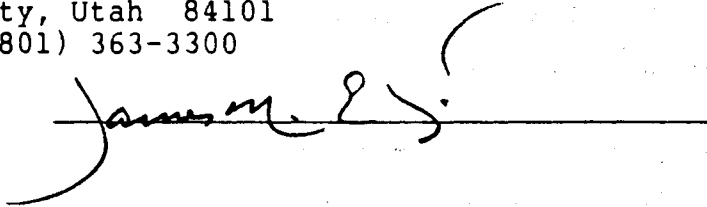
S/ Frank Noel
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing ORDER to the following on this 18th day of March, 1988:

Robert F. Babcock
Darrel J. Bostwick
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Telephone: (801) 531-7000

Steven T. Waterman
Marco B. Kunz
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310 So. Main Street, Suite 1200
Salt Lake City, Utah 84101
Telephone: (801) 363-3300

A handwritten signature, likely "James M. Esch", is written over a horizontal line. The signature is in cursive and includes a large, stylized initial "J".

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